United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-2014

B

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

GARY KINSEY,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK.

BRIEF FOR APPELLEE

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Issues Presented*

In the opinion of the Appellee, the following issues are presented:

I. Whether the District Court erred in its charge that Congress intended to and did include all varieties of Marihuana within the statute.

II. Whether the District Court's charge created an irrebuttable presumption violative of Due Process.

III. Whether the Government is required to prove that the Marihuana seized from the defendant was capable of causing an altered state of consciousness.

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* This case has not previously been before this Court.

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK.

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Counterstatement of the Case

On September 5, 1973 an indictment was filed charging appellant with possession with intent to distribute approximately 107 pounds of marihuana in violation of 21 U.S.C. § 841(a)(1). The jury trial commenced before the Honorable Harold P. Burke on March 26, 1974 and the jury found the appellant guilty as charged on March 29, 1974. On April 22, 1974, appellant was sentenced to one year and one day in a federal penitentiary and a three-year special parole term was also imposed. This appeal followed.

Counterstatement of Facts

Special agents of the Drug Enforcement Administration testified as to the undercover contact and negotiation with appellant for the sale of approximately 100 pounds of marihuana at a cost of $10,000. Following this testimony, the Government called Jeffery Weber, a chemist employed by the Drug Enforcement Administration at its Northeast Regional Laboratory in New York City (G 2[1]). Mr. Weber testified as to tests performed by him to determine whether the substance seized from the appellant is marihuana (G 4, 9-13, 13-21, 29-36). His conclusion upon completion of the three standard tests (*viz.* microscopic examination for cystolith hairs; Duquenois-Levene color test and thin layer chromatography) was that all samples contain marihuana, also known as Cannabis sativa L. (G 7, 37, 79, 81). Mr. Weber's laboratory report (Government Exhibit 3) was received in evidence (G 9).

The defendant called Dr. Thomas Ferrari, a Botanist and Plant Physiologist (D 11). Dr. Ferrari admitted on cross examination that he was not a Toxonomist, which is an expert having the responsibility in the structure of science for the classification of plants (D 29-30). Dr. Ferrari further testified that he had examined only one type of marihuana which he could not identify, but found growing wild in Illinois (D 33-35) and has never chemically tested marihuana in any form (D 50).

Dr. Ferrari's opinion that there are at least three species of marihuana was admittedly based upon several books that he did not read (D 36-40, 44).

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[1] For clarity in referring to the partial record, the reference "G" is used to designate the transcript of the testimony of Jeffery Weber and Dr. Arthur Cronquist. The reference "D" will be used to designate the transcript of the testimony of Dr. Thomas Ferrari, the defendant's motions and the Court's charge.

In rebuttal to Dr. Ferrari's testimony, the Government called Dr. Arthur Cronquist, an expert Toxonomist employed as Director of Botany at The New York Botanical Garden (G 83-84). Dr. Cronquist is an acknowledged expert (G 84-87) who testified to his opinion that there is only one species of Cannabis (G 87) and that the "general botanical opinion" among toxonomists is that there is only one species of Cannabis (G 87, 91-92, 105-111, 145) although this one species may have several "varieties" (G 96). He explained Dr. Ferrari's misplaced reliance on "Flora Europaea" in support of the two-species theory (G 100-101) and generally described throughout his testimony the toxonomic opinion that there is but one species of Cannabis.

In a hypothetical-type question, Dr. Cronquist was asked to assume, contrary to his opinion and "general botanical opinion", that there are three species of Cannabis. He was further asked to use as guides the toxonomic works of those holding to the three-species theory and describe where these "species" are found to grow and what their morphological characteristics are described to be, and thereafter render his opinion as to what "species" the substance seized from the defendant-appellant belonged. Dr. Cronquist concluded that the substance in question is Cannabis sativa (G 146-154).

ARGUMENT

POINT I

The District Court properly denied the defendant-appellant's request to charge that there are several species of Marihuana and correctly charged that Congress intended to proscribe all varieties of Marihuana.

A. Legislative History

The Controlled Substances Act of 1970 provides in 21 U.S.C. § 802(15) that:

> The term "marihuana" means all parts of the plant Cannabis sativa L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin. Such term does not include the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination.

This definition of "marihuana" is essentially that which had been used in the Marihuana Tax Act, 26 U.S.C., § 4761, which was enacted in 1937. The legislative history of the latter provision makes clear that it was marihuana in all its varieties, regardless of geographical origin, to which the statute was directed.

Mr. Hester, Assistant General Counsel for the Treasury Department, in introducing the proposed legislation to the House Committee on Ways and Means, made no distinction between "marihuana" and the variety found in India. He explained:

> Mr. Chairman and members of the Ways and Means Committee, for the past 2 years the Treasury Department has been making a study of the *subject of marihuana*, a drug which is found in the flowering tops, seeds, and *leaves of Indian hemp*, and is now being used extensively by high-school children in cigarettes. Its effect is deadly. *Hearings on H. R. 6385 before the House Committee on Ways and Means*, 75th Congress, 1st Sess. 6 (1937) (*emphasis added*).

The first person to testify before the Committee on Ways and Means, the Commissioner of Narcotics, H. J. Anslinger made it clear that the term "Marihuana" was interchangeable with the other names used to describe the substance:

> This drug is as old as civilization itself. Homer wrote about it, as a drug which made men forget their homes, and that turned them into swine. In Persia, a thousand years before Christ, there was a religious and military order founded which was called the Assassins, and they derived their name from the *drug called hashish which is now known in this country as marihuana*. They were noted for their acts of cruelty, and the word "assassin" very aptly describes the drug.
>
> The plant from which the drug comes is a hardy annual, growing from 3 to 16 feet in height.
>
> *Marihuana is the same as Indian hemp*, hashish. It is sometimes cultivated in backyards. Over here in Maryland some of it has been found, and last fall we discovered 3 acres of it in the Southwest.
>
> *As I say, marihuana is the same as Indian hemp*, and is sometimes found as a residual weed, and sometimes as the result of a dissemination of birdseed. It is known as cannabin, *cannabis Americana or cannabis* Sativa. *Marihuana is the Mexican term for cannabis Indica.* We seem to have adopted the Mexican terminology, and we call it marihuana, which means good feeling. In the underworld it is referred to by such colorful, colloquial names as reafer, muggles, Indian hay, hot hay, and weed. *It is known in various countries by a variety of names.*

Mr. Lewis. In literature it is known as hashish, is it not?

Mr. Anslinger. Yes, sir. There is a great deal of use of it in Egypt particularly. Id. at 18-19 (*emphasis added*).

In referring to the effects of the drug, Mr. Anslinger also stressed the uniformity of the plant variations:

> The toxic effects produced by "*cannabin*", *the active narcotic principle of cannabis sativa, hemp, or marihuana*, appear to be exclusively to the higher nerve centers. The drug produces first an exaltation with a feeling of well being; a happy, jovial mood, usually; an increased feeling of physical strength and power; and a general euphoria is experienced. . . . Id. at 29 (*emphasis added*).

He also submitted statements to the Committee which noted that but one species of Cannabis existed. This statement reads as follows:

> Marihuana Is The Mexican Term for Cannabis Indica
>
> The plant or drug known as *Cannabis indicia, or marihuana, has as its parent the plant known as Cannabis sativa.*
>
> It is popularly known in India as Cannabis indica; in America, as Cannabis americana; in Mexico as Cannabis mexicana, or marihuana.
>
> It is all the same drug, and is known in different countries by different names. It is *scientifically known as Cannabis sativa, and is popularly called Cannabis americana, Cannabis indica, or Cannabis mexicana, in accordance with the geographical origin of the particular plant.*
>
> In the East it is known as charras, as gunga, as hasheesh, as bhang, or siddi, and it is known by a variety of names in the countries of continental Europe.
>
> Cannabis sativa is an annual herb from the "hemp" plant; it has angular, rough stems and deeply lobed leaves.

> It is derived from the flowering tops of the female plant of hemp grown in semi-tropical and temperate countries. It was once thought that only the plant grown in India was active, but it has been scientifically determined that the American specimen termed "marihuana" or "muggles" is equal in potency to the best weed of India. The plant is a moraceous herb.
>
> * * *
>
> Although the different forms of the plant have been described under different botanical names, there are no essential differences in any of the specific characteristics, and all cultivated or wild hemp is now recognized as belonging to *one species—Cannabis sativa.* Id. at 37-38. (emphasis added).

The use of the term Cannabis indica was criticized, and the true meaning of "marihuana" emphasized when the bill was the subject of study by the Senate Finance Committee. Thus a hemp company representative, Mr. Matt Rens, in urging the less confusing term "cannabis", offered the following statement:

> As used in the bill (H.R. 6906), *the term "marihuana" is synonymous with true hemp, the scientific name of which is Cannabis sativa L.* The chemical substance found in hemp which produces the narcotic effect has been officially termed "Cannabis indica", and is known throughout the world as Cannabis indica. *Since botanists now recognize hemp as consisting of only one specie, the term "indica" should be discontinued; thus in referring to hemp in a narcotic sense, the term "Cannabis" is most appropriate and more universally understood.* There can be no good reason for using the term marihuana, which is purely a localized term of Mexican (Indian) origin, and has no more general significance and is no more universally recognized than "bhang", "hashish" and similar local terms. *Id.* at 23-24. (emphasis added).

Thus, the intent of Congress is clear. In proscribing Cannabis sativa L., Congress meant to proscribe "marihuana" in all its forms, no matter where it came from or what it was called.

The legislative history of the Controlled Substances Act reveals that marihuana was extensively discussed, but the definition employed in the 1937 Act was never questioned. Further, there is absolutely no indication that the legislators were aware of the theory, which has not by any means come close to acceptance in the scientific community, that there may be more than one type of "marihuana" nor was Congress' concern anything other than to prohibit the abuse of marihuana in general. *See*, H.R. Rep. No. 91-1444 (Part 1), 91st Cong., 2d Sess. (1970); 116 Cong. Rec. 33603-33667, 35484-35559, 36651-36655, 36880-36885 (1970).

B. The Case Law

The defense raised by the defendant-appellant has been considered and rejected by three federal Courts of Appeals. In 1971, the Third Circuit, interpreting the definition of marihuana found in 26 U.S.C., § 4761(2), which is in all relevant aspects, identical to that in 21 U.S.C. § 802(15), held:

> Marihuana, a term of Mexican origin, is the dried leaves and flowering tops of a plant species commonly known as hemp. Botanically, the hemp plant is called Cannabis sativa L. *There is only one species of this plant. Leary v. United States*, 395 U.S. 6, 50, 89 S.Ct. 1532 23 L.Ed. 2d 57 (1969). However, because of the difference in soil content and climatic conditions, the plant grown in various parts of the world is not physically the same. For example, Mexican marihuana is more potent than domestic and is consequently preferred by smokers. *Leary v. United States, supra*, at 49, 89 S.Ct. 1532. Cannabis indica is the name given to Cannabis sativa L. grown in India. 12 C.J.S. Cannabis pp. 1111, 1112. *We agree with the District Court that "Congress intended the inclusion of the indica variety within the definition of marihuana as set forth in 26 U.S.C. § 4761(a)." United States v. Moore*, 446 F.2d 448, 450 (3d Cir. 1971) (*emphasis added*).

In 1973, this Circuit considered the issues presented in this appeal in *United States v. Rothberg*, 480 F.2d 534 (2d Cir.), cert. denied, 414 U.S. 856 (1973). Although that case reached the Second Circuit by a means procedurally different from this case, there is no meaningful distinction between the statutory construction employed in that case and that urged by the Government in this appeal. In *Rothberg*, the Court held:

> The most that the proferred proof could have established was that at the time of trial there was some and perhaps growing botanical opinion that Cannabis is polytypal and that a distinction can be made between Cannabis Sativa L. and Cannabis Indica Law. This opinion was, however, found by appellant's experts only after the offense here in question. *At the time of the enactment and amendment of the statutes in 1937 and 1956 and up to the time of the offense, there is no question but that the lawmakers, the general public and overwhelming scientific opinion considered that there was only one species of marihuana* so that this Afghan hemp was included within the statutory definition. Id. at 536 (*emphasis added*).

In the *Rothberg* case, the District Court called as its expert witness Dr. Arthur Cronquist, Director of the New York Botanical Garden, the same expert who testified on behalf of the Government in this case. *U.S. v. Rothberg*, 351 F. Supp. 1115 (E.D.N.Y. 1972).

The Fifth Circuit, in a case decided February 15, 1974, considered the statutory definition of marihuana as set forth in 21 U.S.C. § 802(15) and held:

> We are in full agreement with what has been said by our sister Circuits, and thus find no error in the district court's refusal to instruct the jury with respect to the statutory definition of marihuana. *United States v. Gaines*, 489 F.2d 690 (5th Cir. 1974)

Thus, there is unaminity among the Circuits that have considered the question and all have held that the statutory definition of "marihuana" is clear and that it includes all varieties of the plant. In addition, other courts which have considered this question and have decided consistently with the position urged by the Government in this case. *United States v. Adams*, 293 F.Supp. 776 (S.D.N.Y. 1968); *State v. Romero*, 74 N.M. 642, 397 P.2d 26 (1964).

The only decision to the contrary is *United States v. Collier*, Criminal No. 43604-73, 14 CrL. 2503 (Super.Ct. D.C., March 19, 1974). In that case the Superior Court construed the District of Columbia Code §§ 33-401(n), 33-402 which are similar to the statutes in this case, with a pertinent exception. This exception is the presence in 21 U.S.C. § 812(c) of an expanded definition of the proscribed substance "Marihuana". It is submitted that because of this expanded definition the reasoning in the *Collier* case is not applicable to the case at bar. Further, the court in that case relied on an unduly restrictive reading of the criminal statute based upon expert testimony only exposing the polytypic theory. It is submitted that the legislative history of that statute clearly shows that marihuana is monotypic, but that several varieties exist under names other than Cannabis sativa L., not because they are a different species, but because they are given names corresponding to the geographic area of growth. In addition, the general botanical opinion at the present time is that Cannabis sativa L. is monotypic (G 87, 91-92, 105-111, 145). Given the clarity of the statute and legislative history, along with general botanical opinion, it is submitted that this court has ignored the traditional principles of statutory construction in enforcing the true will of Congress.

C. Discussion

This Court's decision in *United States v. Rothberg, supra,* is controlling on the issues in this appeal. The defendant-appellant has urged that decision be distinguished because its construction was based upon the legislative history of the repealed statute. Although it is conceded that the statute has been amended, it is submitted that the legislative history of the prior statute is most pertinent because of their similarity and the fact that, although marihuana was extensively discussed in the legislative history of the Controlled Substances Act, the definition formerly employed in the 1937 Act was never questioned. *U.S. v. Lixon,* 347 U.S. 381 (1953). Further, there is absolutely no indication that the legislators were aware of the theory, which has not come close to acceptance in the scientific community, that there may be more than one type of marihuana, nor was Congress' concern anything other than to prohibit the abuse of marihuana in general. *See,* H.R. Rep.No. 91-1444 (Part I) 91st Cong., 2d Sess. (1970), *supra.* In this regard, it is pertinent to point out that Dr. Schultes, the main proponent of the polytypic theory, maintained in 1968 that there is one species of marihuana *Leary v. United States,* 395 U.S. 6, 50 n. 106 (1968). Furthermore, Dr. Schultes has only recently adopted this polytypic theory, and as recently as 1970 in a symposium volume entitled "The Botany and Chemistry of Cannabis", he has stated unequivocally and repeatedly that there is only one species of Cannabis (G 89-93 see also D 49-50). In view of this evidence, there can be no doubt about the intent of Congress.

It has been suggested that the reference in *Rothberg* to the Controlled Substances Act is favorable to the construction urged by the Appellant. That portion of the *Rothberg* decision is as follows:

> For the future, it would appear that the question is academic, since the statute has been replaced by the present drug abuse prevention and control acts, with much broader descriptions of controlled drugs in addition to the description in question here, the broader descriptions concededly covering this substance whether described as one designation of Cannabis or another. *United States v. Rothberg*, 480F.2d at 536 (2d Cir. 1973)

The Appellant interprets this language to refer to the inclusion of the substance "tetrahydrocannabinols" in 21 U.S.C. § 812(c)(17). The reasoning is that if Congress intended to cover the varieties of Cannabis, it did so by proscribing the psycho-active ingredient of marihuana, or Tetrahydrocannabinol (THC). The conclusion suggested is that the defendant, if at all, should have been convicted of possession of "THC", rather than "Marihuana", the crime for which he was indicted.

The construction suggested by the Appellant is neither supported by the legislative history, nor in logic. The history of this statute suggests that the inclusion of THC was prompted by the fact that this substance is psycho-active, may be synthesized, and thereby may be subject to abuse. 116 Cong. Rec. 35556-35557 (1970).

Moreover, if Congress intended to "broaden" the definition of Marihuana by the inclusion of THC, there would have been no reason to retain the designation "Marihuana" in § 812(c), nor to define its meaning in § 802(15). Rather, Congress would have covered all "species" of *Cannabis* by the mere reference to its psycho-active ingredient, THC.

It is submitted that the more reasoned reading of this reference in *Rothberg* is that the Court was referring to the first sentence of 21 U.S.C. § 812(c) which provides:

> Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation, which contains any quantity of the following hallucinogenic substances, or which contains any of their salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation. . . .

A fair reading of this statute, amplified by its legislative history, will result in the conclusion that Congress, in proscribing Cannabis sativa L., clearly and definitely meant to and did proscribe "Marihuana" in all its forms, no matter where it came from or what it was called.

This reading of the statute is supported by the traditional principles of statutory construction. Although ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity, *Rewis v. United States*, 401 U.S. 808 (1971), where Congress has spoken in language that is clear and definite, the true will of Congress is to be enforced. *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218 (1952). These principles take into consideration two policies which have long been part of our tradition. First, "a fair warning should be given to the world in language that that common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear". *McBoyle v. United States*, 283 U.S. 25, 27 (1931) (Holmes, J.) Second, because of the seriousness of criminal penalties, legislatures and not courts should define criminal activity.

However, the canons of clear statement and strict construction do "not mean that every criminal statute must be given the narrowest possible meaning in complete disregard of the purpose of the legislature". *United States v.*

Bramblett, 348 U.S. 503, 510 (1955). In 21 U.S.C. § 812(c) Congress has "plainly and unmistakenly", *United States v. Gradwell*, 243 U.S. 476, 485 (1917) made it a federal crime to possess "Marihuana" in general, no matter what form, where it came from or what it is called.

In view of the above, the District Court's charge relative to the intent of Congress and the scope of this statute is correct. There is no error here.

Furthermore, whether or not this Court holds that Congress intended to proscribe all forms of Marihuana, there is sufficient testimony in the record upon which the jury verdict could rest convicting the defendant of possession of Cannabis Sativa L. In this regard, the Government chemist, Jeffrey Weber, testified that the substance that he analyzed was Cannabis sativa L. (G 7, 37, 79, 81). Although Mr. Weber further testified that his tests were not capable of distinguishing between different species of Marihuana, this void has been filled by other testimony.

The Appellant admits that there was trial testimony that the defendant picked the plant material in the Midwest (Appellant's brief p. 15). In addition, Dr. Arthur Cronquist, the Government's expert toxonomist, testified in a hypothetical-type question as to the identity of the substance that was seized from the defendant. Dr. Cronquist concluded after his examination of the substance in question, that it was Cannabis sativa (G 146-154).

POINT II

The District Court's instruction that Congress intended to and did include all varieties of Cannabis within the statute did not create an irrebuttable presumption violative of Due Process.

It has consistently been the Government's position that (1) the meaning of "Cannabis sativa L." as it is used in 21 U.S.C. § 802(15) is clear and definite in that Congress intended to include in the definition all forms of Cannabis, wherever grown and however typed by professional taxonomists, and (2) that in all events Cannabis sativa L. is and always was a monotypic species. The District Courts instruction to the jury:

> When Congress used the term Cannabis sativa L., it meant to and did include Cannabis ruderalis J. and Cannabis indica Lam. I instruct you as a matter of law that the term "Marijuana" means all parts of the plant Cannabis sativa L. and further, that Cannabis sativa L., includes Cannabis ruderalis J. and Cannabis indica Lam. (D 71, 72).

while consistent with the Government's position, had as its basis substantial judicial authority. *United States v. Rothberg*, 480 F.2d 534 (2d Cir.), cert. denied, 414 U.S. 856 (1973); *United States v. Gaines*, 489 F.2d 690 (5th Cir. 1974); *United States v. Moore*, 446 F.2d 448 (3d Cir. 1971).

The defendant-appellant contends that this instruction had the effect of creating an irrebuttable presumption violative of Due Process. This is not so.

The appellant has confused statutory construction by the District Court relating to the intent of Congress in enacting 21 U.S.C. §§ 802(15), 812(c), with the statutory presumptions created by Congress in the statutes reviewed

by the Supreme Court in *Tot v. United States,* 319 U.S. 463 (1943) and *Leary v. United States,* 395 U.S. 6 (1968). The situations condemned by the Supreme Court in those cases are at least one step removed from the situation the appellant seeks to condemn in this case.

In both *Tot* and *Leary,* the Court considered a statutory presumption in which Congress mandated that proof of one group of facts necessarily was evidence of the existence of the ultimate fact upon which guilt was predicated. The Court held that such a statutory presumption cannot be sustained if there is no rational connection between the fact proved and the ultimate fact presumed, where the inference is arbitrary because of lack of connection between the two in common experience. *Tot v. United States, supra; Leary v. United States, supra.* Such a presumption does not exist in the statutes which are the subject of this appeal. As such, both *Tot* and *Leary* are thoroughly distinguished from the case at bar.

The "presumption", if we can call it that, which the appellant urges is of a different type. For example, each time Congress enacts a law proscribing certain criminal activity, it does, in effect, create an "irrebuttable presumption" that if someone commits the proscribed act, the law will be violated. This, however, is not the creation of a "presumption", but an enactment of law authorized by the United States Constitution.

The question of whether the statutes considered herein are constitutional has not been raised by the appellant. What is questioned is the District Court's construction of these statutes. The propriety of the District Court's interpretation of these statutes has already been presented. The Court's attention is respectfully directed to Point I of this brief.

POINT III

The Government was not required to prove that the defendant possessed a narcotic drug capable of causing an altered state of consciousness.

The indictment charged the defendant with possession, with intent to distribute approximately 107 pounds of marihuana, a Schedule I controlled substance as set forth in 21 U.S.C. § 812(c). The reason for its inclusion in this statute is by reason of its psycho-active potency. 116 Cong. Rec., 35556. In view of these facts, there is no need for the Government to prove that the substance seized from the defendant was capable of causing an altered state of consciousness, but need only prove that he possessed a measurable quantity of Marihuana, the controlled substance. *Cf. United States v. Wanton*, 380 F.2d 792 (2d Cir. 1967); *United States v. Webb*, 466 F.2d 190 (10th Cir. 1972); *United States v. Sudduth*, 458 F.2d 1222 (10th Cir. 1972); *Jordan v. United States*, 416 F.2d 338 (9th Cir. 1969).

Furthermore, the testimony of the Government chemist, Jeffrey Weber, showed that the small samples on which he performed tests contained tetrahydrocannabiol (THC). (G 34, 56-58, 61-65.) The appellant in his brief has conceded that THC is the psycho-active agent in marihuana (Appellant's brief, P. 16). Since the trial testimony was that the total substance seized from the defendant (approximately 107 pounds) was uniform, it would follow that THC was present in the whole quantity. It follows, *a fortiori*, that the Marihuana seized was capable of causing an altered state of consciousness.

Finally, the appellant failed to timely object to the court's instruction to the effect that the government need

only prove that the substance seized from the defendant was Marihuana as required by Rule 30, Fed.R.Crim.P. Absent plain error, Rule 52(b), Fed.R.Crim.P., he may not now complain. Since the Court's instruction on this issue was entirely correct, appellant cannot show error, much less plain error.

Conclusion

WHEREFORE, appellee respectfully submits that the judgment of the District Court should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF SERVICE BY MAIL

State of New York)
County of Genesee) ss.:
City of Batavia)

RE: U. S. A.
v
Gary Kinsey
Docket No. 74-2014

I, Roger J. Crazioplene being duly sworn, say: I am over eighteen years of age and an employee of the Batavia Times Publishing Company, Batavia, New York.

On the 3 day of September, 1974 I mailed 5 copies of a printed Brief in the above case, in a sealed, postpaid wrapper, to:

Frank R. Webster, P. C.

1 East Main Street

Rochester, New York 14614

at the First Class Post Office in Batavia, New York. The package was mailed Special Delivery at about 4:00 P.M. on said date at the request of:

Gerald J. Houlihan, Assistant U. S. Attorney

233 U. S. Court House, Rochester, New York 14614

Roger J. Crazioplene

Sworn to before me this

3 day of September, 1974

A. GERALD KLEPS
NOTARY PUBLIC, State of N. Y., Genesee County
My Commission Expires March 30, 1975